IN THE

# Supreme Court of The United States

OCTOBER TERM, 1975

No. 75-9921

CARLOS M. MARTINEZ,
*Petitioner*

v.

UNITED STATES OF AMERICA and JOHN T. RUSSELL,
Special Agent to the Internal Revenue Service,
*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**Legend**

Abbreviations:
I.R.C. — Internal Revenue Code
I.R.S. — Internal Revenue Service

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Petitioner Carlos M. Martinez respectfully prays that a writ of certiorari issue to review the United States Court of Appeals for the Fifth Circuit *per curiam* affirmance of the order issued by the United States District Court, Southern District of Texas, Houston Division. which required Mr. Martinez to comply with eight (8) I.R.S. summons requesting production of certain books and records. Said *per curiam* affirmance occurred on August 5, 1975 and Mr. Martinez's Petition for Rehearing was denied on October 3, 1975.

## OPINION BELOW

The United States District Court, Southern District of Texas, Houston Division, the Honorable Carl O. Bue presiding, filed a "Bench Ruling" (R.A. 82) on February 10, 1975; requiring Mr. Martinez to comply "in all respects with the eight (8) [I.R.S.] summonses issued on July 31, 1974, pertaining to the corporate records [in question]" (*emphasis ours*) (R.A. 83). Further, findings of the Trial Court were as follows: that the instant case involved only a civil investigation conducted by the I.R.S. to determine whether Mr. Martinez should be liable for further taxes and that the testimony of John T. Russell, an I.R.S. special agent, was uncontroverted as to the investigation being conducted solely to determine whether Mr. Martinez owes more tax and that no criminal investigation has ever been put into operation (R.A. 84, 85); the summonses issued requested only production of certain corporate records of the eight (8) named corporations or entities, the reasons prompting the request for production of the corporation records were good faith reasons, have occurred well prior to any possible criminal prosecution, and there has been no evidence to indicate that any criminal prosecution will ever occur (R.A. 85); that the burden to prove deficiencies in the summonses is on Mr. Martinez because of the "good faith" issuance (R.A. 86); that the Court was at a total



loss to understand how a person who refuses to acknowledge his affiliation with a corporation or entity has the right to claim any privilege regarding records which belong to the corporation (R.A. 86); the conclusion, based on the evidence, that Mr. Martinez was indeed, and in fact, the custodian of records of the entities involved (R.A. 87); that the Fifth Amendment privilege does not extend to a custodian of corporate records or a possessor of records of a collective entity which are possessed in a representative capacity even though such records might incriminate the custodian or possessor personally (R.A. 88); that the custodian must produce and identify or authenticate the corporate records summoned and so must Mr. Martinez (R.A. 88, 89); and "that the Petition to Enforce the summonses referred to in this case should be, and hereby is, granted. The Respondent Martinez is directed to comply immediately by producing all of the requested materials described in the summonses" (R.A. 90).

## JURISDICTION

Mr. Martinez's Petition for Rehearing was denied by the Court of Appeals for the Fifth Circuit on October 3, 1975. This petition for the writ of certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## QUESTION PRESENTED FOR REVIEW

Whether the Government's failure to plead or prove "that the information sought is not already within the Commissioner's possession" requires reversal of the judicial ruling that the Petitioner must comply with the eight (8) I.R.S. summonses.

## STATEMENT OF THE CASE

This is an appeal of an affirmance by the United States Court of Appeals for the Fifth Circuit of an order entered by the United States District Court for the Southern

District of Texas, Houston Division, granting enforcement of summonses issued pursuant to Section 7602 IRC 1954. The proceeding was brought by the United States and John T. Russell, Special Agent of the Internal Revenue Service under Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954. The District Court ordered compliance in all respects but stayed its order during pendency of the appeal.

The facts pertinent to the question presented for review, set forth within the context of time to the events as reflected by the record on appeal, are as follows:

John T. Russell is a special agent with the Internal Revenue Service Intelligence Division (R.A. 47). Mr. Russell was assigned to investigate the tax liability, for the calendar years 1970, 1971 and 1972, of the Petitioner, Carlos M. Martinez, and further, to determine if Mr. Martinez had been in violation of any provision of the Internal Revenue Service Code (R.A. 48). Mr. Russell, in the course of his investigation, went to 9302 Leader, Houston, Texas, unannounced (R.A. 60), contacted Mr. Martinez personally, on February 11, 1974, (R.A. 48-49) and "before engaging in conversation with Mr. Martinez" (R.A. 48) he advised Mr. Martinez of his constitutional rights by reading them from a prepared statement that Mr. Russell carries with him (R.A. 48), later determined to be a *Miranda* warning (R.A. 61). Subsequent to the *Miranda* warning, Mr. Russell and Mr. Martinez engaged in conversation whereupon Mr Russell learned that Mr. Martinez was President of one (1) corporation and General Manager of six (6) others (R.A. 49, 50) and Mr. Martinez learned that Mr. Russell was an I.R.S. special agent who, among other things, investigates for violations of the criminal tax laws (R.A. 60).

Sometime after February 11, 1974, Mr. Russell obtained copies of the Articles of Incorporation and the forfeiture



of the Charter of General Ornament Corporation under the seal of the Secretary of State for the State of Texas (R.A. 52). Said copies indicated that Carlos M. Martinez was an incorporator, initial director, the registered agent for service, and that the registered office was 9302 Leader, Houston, Texas 77036, (R.A. 52). Mr. Russell had also obtained photocopies of a State of Texas Corporation Franchise Tax Report and a Form 1120, U.S. Corporation Income Tax Return, for Transcontinental Artist Corporation for years 1969 and 1970, all of which reflects that a Charles M. Martinez signed the forms as Corporate President (R.A. 54-56).

Mr. Russell issued eight (8) summonses addressed to the eight (8) Corporations involved (R.A. 57). Two (2) were addressed to "Carlos Martinez, President" (R.A. 15, 17) and six (6) were addressed to "Carlos Martinez, Custodian of Records" (R.A. 19, 21, 23, 25, 27, and 29). Mr. Russell personally served Mr. Martinez with the eight (8) summonses (R.A. 57) on July 31, 1974 (R.A. 16, 18, 20, 22, 24, 26, 28, and 30). Each summons was titled "In the matter of the tax liability of Carlos M. Martinez", for the "Periods 1970, 1971, and 1972", and requested the production of the exact same items of each different Corporation and the giving "of testimony relating to the tax liability or the collection of the tax liability of the above named person for the periods designed" (R.A. 15-29). These summons were identified as "Internal Revenue Service Summons, Form 2030" (R.A. 57). Mr. Martinez and the Corporations were directed to appeal before Mr. Russell on August 12, 1974 (R.A. 15-29); all parties, with their attorney, appeared on said date but refused to comply with the summonses by producing the books, records and other documents demanded in the summonses (R.A. 8).

On January 7, 1975, the Government filed a "Petition to Enforce Internal Revenue Summons" (R.A. 1) requesting all persons named in each summons to "show cause" why

they "should not comply with and obey the summonses" in each and every requirement (R.A. 9) and the entering of an order by the trial court directing all said persons to obey the summonses in each and every requirement by ordering the attendance and production of the records as is required and called for by the terms of the summonses (R.A. 9, 10). The Petition was supported by the Affidavit of special agent John T. Russell (R.A. 11-14) which he swore to on October 10, 1974 (R.A. 14), in which he stated that it was "necessary to examine the requested books, records and other papers demanded by the summonses in order to ascertain the correct income tax liability of Carlos M. Martinez for the years 1970 through 1972" (R.A. 14).

The Honorable Carl O. Bue, Jr., United States District Judge for the Southern District of Texas entered an "Order to Show Cause" on January 22, 1975, ordering all parties named in each summons to appear in court on February 11, 1975, to show cause why they should not be compelled to produce the records demended by said summonses and giving the Respondents five (5) days after service of the Government's Petition and Exhibits to file a written response to same (R.A. 32). On January 28, 1975, the "Response of Carlos M. Martinez, Individually" was filed (R.A. 32). Said response contained, essentially, a declination to admit or deny that he was a Respondent in any of the capacities named in the Government's Petition (R.A. 32-36), that the response filed was on behalf of Mr. Martinez as an individual only (R.A. 32-36), that his declination to "admit or deny" was based on his exercising his Fifth Amendment privilege against self-incrimination (R.A. 32-36) as was his failure to produce any records because such would constitute an admission of direction, control and responsibility of and for the conduct of the entities named in the summons (R.A. 35). Further, the response asserted that the summonses was *ad testificandum* as well as *duces tecum* and as such they were an attempt to compel



Mr. Martinez to give incriminatory evidence (R.A. 35) and, for all of the above reasons, requested that the Government's Petition be denied (R.A. 36).

The Government, at the February 10, 1975 hearing on the "Order to Show Cause", limited its request for compliance with the summonses to entail only the request for the production of the corporate records and books enumerated in each of the eight (8) summons (R.A. 39) and stated that the government was not seeking "any personal testimony from Mr. Martinez" (R.A. 39). Further, Mr. Russell stated that he had not yet completed his investigation of Mr. Martinez's tax liability (R.A. 58), that he had not ever made any recommendation for criminal prosecution of Mr. Martinez as a result of this investigation (R.A. 58), that he had not formed in his mind any intent to make a recommendation for said criminal prosecution at the time of the hearing in question, at the time the summonses were issued, or at any time since the investigation began (R.A. 58), and that the only reason the requested books and records listed in the summonses were necessary for the completion of his investigation was to determine Mr. Martinez's gross income for the years 1970, 1971 and 1972 (R.A. 58, 59).

The United States District Court, Southern District of Texas, Houston Division, the Honorable Carl O. Bue presiding, filed a "Bench Ruling" (R.A. 82) on February 10, 1975; requiring Mr. Martinez to comply "in all respects with the eight (8) [I.R.S.] summonses issued on July 31, 1974, pertaining to the corporate records [in question]" (*emphasis ours*) (R.A. 83). Further, findings of the Trial Court were as follows: that the instant case involved only a civil investigation conducted by the I.R.S. to determine whether Mr. Martinez should be liable for further taxes and that the testimony of John T. Russell, an I.R.S. special agent, was uncontroverted as to the investigation being conducted solely to determine whether Mr. Martinez owes

more tax and that no criminal investigation has ever been put into operation (R.A. 84, 85); the summonses issued requested only production of certain corporate records of the eight (8) named corporations or entities, the reasons prompting the request for production of the corporation records were good faith reasons, have occurred well prior to any possible criminal prosecution, and there has been no evidence to indicate that any criminal prosecution will ever occur (R.A. 85); that the burden to prove deficiencies in the summonses is on Mr. Martinez because of the "good faith" issuance (R.A. 86); that the Court was at a total loss to understand how a person who refuses to acknowledge his affiliation with a corporation or entity has the right to claim any privilege regarding records which belong to the corporation (R.A. 86); the conclusion, based on the evidence, that Mr. Martinez was indeed, and in fact, the custodian of records of the entities involved (R.A. 87); that the Fifth Amendment privilege does not extend to a custodian of corporate records or a possessor of records of a collective entity which are possessed in a representative capacity even though such records might incriminate the custodian or possessor personally (R.A. 88); that the custodian must produce and identify or authenticate the corporate records summoned and so must Mr. Martinez (R.A. 88, 89); and "that the Petition to Enforce the summonses referred to in this case should be, and hereby is, granted. The Respondent Martinez is directed to comply immediately by producing all of the requested materials described in the summonses" (R.A. 90).

Mr. Martinez filed his Notice of Appeal (R.A. 90) and Motion For a Stay (R.A. 91-93) on February 14, 1975 (R.A. 90, 91). The Honorable Judge Bue entered the Order Granting Motion to Stay Enforced of Bench Ruling on February 20, 1975, (R.A. 93) since said ruling is a final appealable order (R.A. 94).



## REASONS FOR GRANTING THIS WRIT

**The Court of Appeals for the Fifth Circuit's per curiam affirmance of the District Court's "Bench Ruling" conflicts with this Court's decision of *United States* v. *Powell*, 379 U.S. 48, 85 S.Ct. 248 (1964), and its progeny. Further, said affirmance conflicts with decisions of other Courts of Appeals, and with decisions within the Fifth Circuit, requiring the Government to plead or prove that the enforcement of the I.R.S. summonses is necessary because the information sought is not already within the Commissioner's possession. Only an authorative decision by this Court can reconcile the conflict among the Circuits and within the Fifth Circuit.**

The "Bench Ruling" by the District Court ordering Mr. Martinez to comply with the eight (8) I.R.S. summonses in question was issued despite the fact that the record of the proceedings before the Honorable Carl O. Bue, Jr., reflects a complete and total absence of even a scintilla of evidence that the enforcement of the I.R.S. summonses was necessary because the information sought by the Government was not already within the Commissioner's possession. A comprehensive reading of the record of said proceedings reveals that the Government totally failed to either allege in their pleadings or offer any testimony as evidence at the "Show Cause" hearing of February 10, 1975, on the issue of whether or not the Commissioner was in possession of the items requested for production by the eight (8) summonses issued.

This Court, in *United States* v. *Powell*, 379 U.S. 48, 85 S.Ct. 248 (1964), set forth the minimum standards of proof the Government must meet before a petition for enforcement of an I.R.S. summons can be granted by a Federal District Court. In *Powell*, 379 U.S. at 57-58, 85 S.Ct, at 255, this Court held said minimum standards to be that the Commissioner must show

> "• • • that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be rele-

> vant to the purpose, *that the information sought is not already within the Commissioner's possession,* and that the administrative steps required by the [Internal Revenue] Code have been followed • • •.
>
> • • • This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered.• • •" (*Emphasis ours*)

This Court further recognized that it was the Court's processes that are invoked to enforce the administrative summons of the I.R.S. and a Court may not permit its process to be abused but the taxpayer has the burden of showing such an abuse of the Court's process. *Powell,* 379 U.S. at 58, 85 S.Ct. at 255. *Powell* had a companion case, *Ryan* v. *United States,* 379 U.S. 61, 85 S.Ct. 232 (1964), which raised only one issue on appeal: whether the Government must show probable cause for its examination of the records, i.e., whether the Government must show probable cause before a Court can properly invoke its process by granting the Government's "Petition for Enforcement" of an I.R.S. summons? *Ryan,* 379 U.S. at 62, 85 S.Ct. at 233. *Powell* posed the same issue and *Ryan* was affirmed "for the reasons given in United States v. Powell, 379 U.S. 48, 85 S.Ct. 248 [255 (1964)]" (*emphasis ours*). *Ryan,* 379 U.S. at 62, 85 S.Ct. at 233. *Donaldson* v. *United States* 400 U.S. 517, 526-527, 91 S.Ct. 534, 540 (1971), explained the rationale of the *Powell* and *Ryan* decisions being bottomed on the fact that the United States Supreme Court was primarily concerned with the "standards the Internal Revenue Service must meet in order to obtain judicial enforcement of its orders". See also *United States* v. *Matras,* 487 F.2d 1271, 1274 (8 Cir. 1971). *Donaldson* reiterated the rationale of the *Powell* decision in that at the adversary hearing to which the taxpayer is entitled before enforcement is ordered, he may challenge the summons on any appropriate ground and that the burden of showing an abuse of the Court's process is on the taxpayer. 400 U.S. at 527, S.Ct. at 540. Thus, the fact that *Powell* is still a viable and precedential decision in our jurisprudence cannot be contradicted.



The conflict in the circuits exist because of the differing views in the analysis and application of *Powell* and its progeny. The numerous decisions, in the analyzation of the *Powell* progeny, have all recognized certain enumerated "constants" in the formulation of this area of jurisprudence. The "constants" are as follows: (1) the I.R.S., in order to obtain judicial enforcement of an administrative summons must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed, *Donaldson, supra; United States* v. *Newman,* 441 F.2d 165, 169 (5 Cir., 1971); *United States* v. *Vey,* 324 F.Supp. 552 (D.D.Pa., 1971); *United States* v. *Pritchard,* 438 F.2d 969 (5 Cir., 1971); *United States* v. *Schoeberlein,* 335 F.Supp. 1048 (D.Md., 1971); *United States* v. *Mothe,* 303 F.Supp. 1366 (E.D.La., 1969); *United States* v. *Giordana,* 419 F.2d 564 (8 Cir., 1969); *United States* v. *Acker,* 325 F.Supp. 857 (S.D.N.Y., 1971); *McGarry's, Inc.* vs. *Rose,* 344 F.2d 416 (1 Cir., 1965); *Wild* v. *United States,* 362 F.2d 206 (9 Cir., 1966); *United States* v. *Berkowitz,* 355 F.Supp. 897 (E.D.Pa., 1973); *United States* v. *Williams,* 337 F.Supp. 1114 (S.D.N.Y., 1971); *United States* v. *Egenberg,* 443 F.2d 512 (3 Cir., 1971); *United States* v. *Bell,* 448 F.2d 40 (9 Cir., 1971); *United States* v. *Troupe,* 317 F.Supp. 416 (W.D.Mo., 1970) *United States* v. *Harrington,* 388 F.2d 520 (2 Cir., 1968); *United States* v. *Matras, supra; United States* v. *Roundtree,* 420 F.2d 845 (5 Cir., 1969); *Venn* v. *United States,* 400 F.2d 207 (5 Cir., 1968); *United States* v. *Howard* 360 F.2d 373 (3 Cir., 1966); (2) the taxpayer is entitled to an adversary hearing before enforcement of the I.R.S. administrative summons can be ordered, *Donaldson, supra; Newman, supra; Roundtree, supra; McGarry's, Inc., supra;*

*Vey, supra; United States* v. *Campbell,* 390 F.Supp. 711 (D.S.D., 1975); *Howard, supra;* and (3) the taxpayer has the burden of showing an abuse of the Court's process when contesting the enforcement of the I.R.S. administrative summons. *Donaldson, supra; Newman, supra; Roundtree, supra; Venn, supra; Egenberg, supra; Campbell, supra; Acker, supra; Vey, supra; and United States* v. *Theodore,* 347 F.Supp. 1070 (D.S.C., 1972).

The circuits' application of the above enumerated "constants" has caused the conflict within the judicial system. The difference in the application of the three (3) enumerated "constants" must be reconciled by this Court. *e.g.* "constant number (1)": *Powell* dictates that such minimal standards of proof are mandatory requirements that must be shown by the pleadings and proof of the Government before the Court's process can be invoked to enforce compliance with an I.R.S. administrative summons, *see also, Donaldson, supra; Wild, supra,* at 208; *Pritchard, supra,* at 931; *Harrington, supra,* at 524; *Egenberg, supra,* at 515, *Berkowitz, supra,* at 900; *Campbell, supra,* at 713; but *Newman, supra,* at 169, holds that "Before the Government is called upon to make this [*Powell*] showing, the summoned party must raise in a substantial way the existence of substantial deficiencies[17] in the summons proceedings. • • •" (*emphasis ours*), thus shifting the burden to the taxpayer to meet the requirements of "constant number (3)" prior to the Government having to present even a *prima facie* case for enforcement in compliance with the requirements of "constant number (1)". Further, in *Schoeberlein, supra,* 1059, the Respondents argued that the Government was not entitled to the documents requested by an I.R.S. administrative summons because the Government did not allege and prove that the records were not already within its possession, relying on *Pritchard, supra,* at 971, but the Court held "that the information sought is not already within the Commissioner's possession". Thus, the Court completely



ignored the *Powell* mandate, made a conclusion unsupported by the pleadings and proof, and completely defeated the "right to a adversary hearing" concept of "constant number (2)"; this was done despite the rationale that, in enforcement proceedings relating to an I.R.S. administrative summons, a petition for enforcement followed by a show cause order is treated as a complaint and governed by the Federal Rules of Civil Procedure. *See, Powell, supra,* 379 U.S. at 58, N. 18; *Wild, supra,* at 169.

The concept that *Powell* and its progeny expressly prohibits enforcement of an I.R.S. administrative summons absent the Government's pleading and proof that the information sought was not already within the Commissioner's possession was, at least implicity, recognized in *Berkowitz, supra,* at 901, which agreed with the Court in *Theodore, supra,*

> "that the language of *Powell* is not so broad as to cover the instant situation where the information sought is already in the Commissioner's possession, but it is impossible or unjustifiably difficult and expensive to identify."

Also, *Matras, supra,* at 1275, explicitly recognized that the burden of proof is with the Government to show that the information sought by an I.R.S. administrative summons was not already with the I.R.S.'s possession.

The conflict in application of the "enumerated constants" of *Powell* and its progeny by the circuits must be reconciled by an authorative decision by this Court. Does the Government have the burden of pleading and proving a *prima facie* case that the information sought by the issuance of an I.R.S. administrative summons is not already within the Commissioner's possession prior to the arising of the taxpayer's burden of having to show an abuse of the Court's process, *see, Campbell, supra; Pritchard, supra,* or does the taxpayer have to first raise in a substantial way the existence

of substantial deficiencies in the summons proceedings before the Government has to make any showing in compliance with the *Powell* doctrine? *Newman, supra,* at 169. Better yet, can the Court just *conclude* that the Government does not have the information sought by the summons, as it did in *Schoeberlein,* without any pleadings or proof by the Government that would support such a conclusion? Can there be a true "adversary hearing" if the taxpayer has no knowledge or notice of whether the Government does or does not already have the information sought within its possession? It must be noted that in the instant case the Government neither plead nor offered any evidence in support of the proposition that it did not already have such information. It is axiomatic that the taxpayer can answer responsively only those averments which the Government sets forth in its claim for relief, Rule 8, F.R.Civ.P. Further, the taxpayer may raise the question of the sufficiency of the evidence to support the findings of fact made in actions tried by the Court without a jury after said findings are in fact entered in the Court's record even though the party raising the question has not made an objection to such findings, a motion to amend them, or a motion for judgment in the district court. Rule 52, F.R.Civ. P. Thus, a complete failure by the Government to plead or prove that the information sought by the eight (8) summonses in issue was not already within their possession and the District Court's order that Mr. Martinez had to comply with said eight (8) I.R.S. administrative summonses raises not only the issue of the conflict between the circuits but also the very real question as to the sufficiency of the evidence to support said District Court's order.



## CONCLUSION

For the foregoing reasons the Petitioner respectfully urges that this petition for the writ of certiorari should be granted.

Respectfully submitted,

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*Counsel for the Petitioner*

## CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit were mailed by certified mail to Michael Rodak, Jr., Clerk of the Supreme Court of the United States, Office of the Clerk, Washington, D.C. 20543, to Mr. Gilbert E. Andrews, United States Department of Justice, Washington, D.C., and Mr. Ed. McDonough, United States Attorney, 515 Rusk Avenue, Houston, Texas, on this the 2nd of January, 1976.

William Benjamin House, Jr.